IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS DORSZYNSKI,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-5284

DOUGLAS RAYMOND DORSZYNSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

APPENDIX

DOCKET ENTRIES

Document No.	Date	Proceedings
	1971	
1-3	Oct. 21	Record of proceedings before Judge John W. Reynolds as magistrate, with complaint, warrant as to deft. DORSZYNSKI executed 1/20/71, warrant as to deft. STEINHOFF executed 10/26/71, appearance bonds as to each deft. in sum of $1,500.00 O/R.
	1972	
4	Feb. 14	HEARING on filing information, Information filed, arr., plea and imposition of sentence as to both defts. (MLG): DORSZYNSKI: Deft. arraigned. Plea of guilty entered. Court finds a basis in fact for the plea and enters judgment of conviction. Pre-sentence

DOCKET ENTRIES

Document No.	Date	Proceedings
	1972	
4	Feb. 14	report previously ordered. SENTENCE: Deft. committed to imprisonment for one year, to serve the first 90 days in a jail-type institution—execution of remainder of sentence suspended and deft. placed on probation for two years to commence upon his release from physical custody. Judgment, commitment and order of probation issued. STEINHOFF: Deft. arraigned. Plea of guilty entered. Court finds a basis in fact for the plea and enters judgment of conviction. Pre-sentence report previously ordered. SENTENCE: Deft. committed to imprisonment for one year, to serve the first 60 days in a jail-type institution-execution of remainder of sentence suspended and deft. placed on probation for 2 yrs., to commence upon his release from physical custody. Judgment, commitment and order or probation issued.
5	Feb. 24	Judgment and commitment as to each deft. ret'd executed 2/14/72.
6	Feb. 24	Transcript of 2/14/72 proceedings.
7	Feb. 25	Defts' unrated letters, treated by the court as motions for reduction of sentence under Rule 35, and orders (MLG) denying motions.
8	Mar. 2	Defts' motion for reduction of sentence pursuant to Rule 35 F. R. Cr. P.
9	Mar. 2	Order (MLG) denying defts' motion for reduction of sentence.

DOCKET ENTRIES

Document No.	Date	Proceedings
	1972	
10	Apr. 14	Motion of deft. DORSZYNSKI to withdraw plea of guilty and for jury trial.
11	Apr. 18	Notice of substitution of Samson, Friebert, Sutton & Finerty as counsel for deft. DORSZYNSKI.
12	Apr. 18	Motion of Deft. DORSZYNSKI for bail.
13	Apr. 20	Stipulation and order for substitution of Samson, Friebert, Sutton & Finerty as attys. in place of Michael Jan Steckelis for deft. DORSZYNSKI.
14	Apr. 25	Order (MLG) denying deft. DORSZYNSKI's motion for release from custody on bail.
	May 12	Govt's reply memorandum.
20	May 9	Certified copy of order of Court of Appeals, denying deft. DORSZNYSKI'S emergency application for bail.
15	May 1	Motion to deft. DORSZYNSKI to withdraw plea of guilty.
16	May 1	Motion of deft. DORSZYNSKI for release from custody pursuant to 28 U.S.C. Sec. 2255.
17	May 1	Renewed motion of DORSZYNSKI for bail.
18	May 1	Motion of deft. DORSZYNSKI for reduction of sentence.
19	May 1	Supplemental motion of DORSZYNSKI to withdraw plea of guilty, for reduction of sentence and to be released from custody pursuant to 28 U.S.C. Sec. 2255.

Document No.	Date	Proceedings
	1972	
21	June 2	HEARING on motion of DORSZYNSKI to vacate plea of guilty (MLG); Motion to vacate plea of guilty denied. Motion to reduce sentence denied. U.S. Attorney to submit order. Court orders revocation of deft's probation. Deft's request for hearing on revocation denied. Request for stay pending appeal denied.
22	June 2	Deft's motion and order granting permission to enter document into file (Conditions of Probation).
23	June 2	Deft's motion and order allowing him to appeal in forma pauperis, and transcript of proceedings shall be supplied at government expense.
24	June 2	Notice of appeal of deft. DORSZYNSKI filed.
25	June 1	Transcript of 10/21/71 proceedings before Judge John W. Reynolds acting as magistrate.
	June 2	Record on appeal forwarded to U.S. Court of Appeals 7th Circuit, Chicago, Illinois.
26	June 2	Appearance bond in sum of $1,000.00 O/R, pursuant to order of Judge Thomas E. Fairchild.
27	June 5	Certified copy of order of Court of Appeals, Seventh Circuit, granting application of deft. to be released on $500.00 O/R bond.

Document No.	Date	Proceedings
	1972	
28	June 7	Order (MLG) denying motions of deft. DORSZYNSKI.
	June 8	Appearance bond filed 6/2/72 and order filed 6/7/72 forwarded to U.S. Court of Appeals, 7th Circuit, Chicago, Illinois to be included with record on appeal.
29	June 21	Transcript of proceedings upon hearing to vacate plea of guilty.
	June 23	Voucher of Carol Zuber (for transcript) mailed to AO. Copy filed.
	1973	
30	Aug. 13	Mandate of the Court of Appeals, reversing the order revoking deft's probation, and affirming orders denying other motions.
	Aug. 13	Appeal record received—1 vol pleadings; 1 vol transcript; supplement to record.
31	Dec. 17	Copy of order of the Supreme Court granting petition of deft. DORSZYNSKI for writ of certiorari and for leave to proceed in forma pauperis.
32		Certificate of Clerk.

PROCEEDINGS UPON FILING INFORMATION, ARRAIGNMENT, PLEA AND SENTENCE

COURT CLERK: United States v. Douglas Raymond Dorszynski and Barry Steinhoff. There is no case number.

This proceeding is for the purpose of filing information, arraignment, plea and sentence.

May we have appearances, please?

MR. STADTMUELLER: Joseph P. Stadtmueller appearing for the United States.

MR. PODELL: Richard Podell appearing for the defendants, and both the defendants appearing in person.

MR. STADTMUELLER: Your Honor, I have caused to be filed with your court this morning a One-Count Information charging these two defendants with unlawful and knowing possession of a thousand tablets of Lysergic Acid Diethylamide, which is commonly known as "LSD," a Schedule I Controlled Substance, not having previously obtained such substance directly from or pursuant to a valid prescription or order by a practitioner while said practitioner was acting in the course of his professional practice, all in violation of Section 844(a), Title 21, United States Code and Section 2, Title 18, United States Code.

Under the offenses charged, these defendants face maximum penalties of up to one year in prison and a fine of up to $5,000.00 or both. In addition, as one or both of these defendants may be under the age of 26, they may also be subject to the Federal Youth Corrections Act.

COURT: Mr. Podell?

MR. PODELL: Your Honor, at this time both defendants would enter a plea of "Guilty" to the charges.

COURT: I have to question each of them.

You gentlemen were in court earlier when you heard me say before accepting a plea I must be satisfied it is understandably made and voluntary.

Which is Mr. Dorszynski?

DEFENDANT DORSZYNSKI: Here (Raising hand).

BY THE COURT, OF DOUGLAS RAYMOND DORSZYNSKI:

Q. Your full name, sir?
A. Douglas Raymond Dorszynski.
Q. How old are you?
A. Nineteen.
Q. How much schooling have you had?
A. In my second year of college.
Q. Has there ever been an inquiry into your mental capacity?
A. No, sir.
Q. What do you understand the charge to be against you?
A. Possession of LSD.
COURT: Is it a single count?
MR. STADTMUELLER: You, Your Honor, it is.
COURT:
Q. What do you understand to be the permissible penalty?
A. $5000.00 fine and one year in prison.
Q. Or both?
A. Or both, right.
Q. Is that correct?
MR. STADTMUELLER: Yes, Your Honor.
COURT: Is it a felony?
MR. STADTMUELLER: No, it is not, Your Honor; it is a misdemeanor.

BY THE COURT, OF DOUGLAS RAYMOND DORSZYNSKI:

Q. Now you have a right to a trial, trial before a jury, a right to have your witnesses against you appear so you may be confronted by them. You are presumed innocent until and unless the Government is able to prove beyond a reasonable doubt that you are guilty. If you enter a plea of guilty, you waive all that.
A. Yes, sir.
Q. Do you desire to do that?
A. Yes, I do, sir.
Q. Has anybody exercised any pressure on you to plead guilty?

A. No, sir.

Q. Did anybody make any promises to you what would happen if you did not plead guilty?

A. No, sir.

Q. Any threats or promises?

A. No, sir.

Q. Do you think arrangements have been made with the court as to what your penalty would be?

A. No.

Q. So, subject to the maximum limitation, you understand you might get anything less than or as high as that, but nothing more; is that correct?

A. Yes, sir.

Q. Can't hear you.

A. Yes, sir.

Q. Do you think you have had an ample opportunity to talk to your attorney and understand what's going on?

A. Yes, sir.

Q. You desire to plead guilty?

A. Yes, I do sir.

BY THE COURT, OF BARRY STEINHOFF:

Q. Now you are Barry Steinhoff?

A. Yes, sir.

Q. How old are you, Mr. Steinhoff?

A. Nineteen.

Q. How much schooling have you had, sir?

A. I am at MATC now, my first year.

Q. Finish high school?

A. No—about a half a year behind.

Q. Has there ever been a question raised as to your mental capacity?

A. No, sir.

Q. Tell me, in your own words, what you think you are charged with here.

A. Possession of dangerous drugs.

Q. And what kind of drugs?

A. LSD.

Q. What do you understand the maximum penalty to be?

A. $5000.00 and/or one year.

Q. Do you believe that any arrangement has been made with the court as to what your actual penalty will turn out to be?

A. No, sir.

Q. Anything up to but not more than the maximum is what might be imposed upon you. Do you understand that?

A. Yes.

Q. Now, you have heard me explain to Mr. Dorszynski that if a plea is accepted you'd be waiving a trial and waiving all the constitutional rights, such as to be confronted by the witnesses against you, to have a jury determine your guilt or innocence, to have the presumption of innocence applied to you?

A. Yes, sir.

Q. You want to waive all that?

A. Yes, sir.

Q. You think you understand the proceedings?

A. Yes, sir.

Q. You are satisfied that nobody has pressured you or promised anything to you that has induced you to plead guilty?

A. Yes, sir.

Q. And do you feel you have had an ample opportunity to talk to Mr. Podell about this?

A. Yes, sir.

COURT: What would the Government be prepared to prove as to both defendants if the case went to trial?

MR. STADTMUELLER: Your Honor, in this matter the Government would be prepared to establish through the testimony of Michael J. Stricher, a Special Agent employed by the Justice Department, Bureau of Narcotics and Dangerous Drugs, that he, Stricher, received information from an unidentified source that an individual by the name of Barry, later identified as Barry Steinhoff, has large quantities of LSD available and that he was selling them for approximately $700.00 per 1,000 dosage units.

On October 18, 1971, Mr. Stricher would testify that he made initial contact with Mr. Steinhoff by telephoning him at his residence and arranged for future purchases

of LSD. The next day a sample was delivered to Mr. Stricher by Mr. Steinhoff, and subsequent thereto, namely, on October 20, 1971, Special Agent Stricher contacted Steinhoff telephonically and arranged to meet him and his source of supply at 6:00 o'clock that evening, and at that time Mr. Steinhoff appeared with Mr. Dorszynski and met Mr. Stricher at Frosty's Grill in the City of Milwaukee, at which time the 1,000 tablets were transferred to Mr. Stricher and the defendants were placed under arrest with no sale actually having been consummated because no money changed hands.

The testimony of Mr. Dennis Korte, a forensic chemist employed by the Department of Justice, Bureau of Narcotics and Dangerous Drugs, would establish that on October 21, 1971, he conducted a chemical analysis of the tablets purported to be LSD and his tests proved that they were in fact Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance.

COURT: Mr. Dorszynski, if that proof were offered, would it be substantially correct?

DEFENDANT DORSZYNSKI: Yes, it would, sir.

COURT: I ask you the same question, Mr. Steinhoff: If that proof were offered, would it be substantially correct?

DEFENDANT STEINHOFF: Yes, sir.

COURT: Have you satisfied yourself, Mr. Podell, that there are no technical defenses which your clients might not be familiar with?

MR. PODELL: Yes, I am, Your Honor.

COURT: You are satisfied that each of the two defendants understands the proceedings and without undue —without any coercion or any misrepresentations on the part of anyone, that each of them is desirous of pleading guilty?

MR. PODELL: Yes, I am, Your Honor.

We have discussed this matter at great length with numerous conferences, and I feel this is their wish and desire, and in their best interest, Your Honor.

COURT: All right, the court does accept the pleas of guilty in each case being satisfied that both Mr. Dorszynski and Mr. Steinhoff understands these proceedings, that

they are knowledgeably and intelligently desirous of waiving their constitutional rights, and that absent any coercion or promises they intelligently and knowledgeably desire to enter pleas of guilty with full awareness of the circumstances and the permissible consequences and, accordingly, the please of guilty are now accepted and judgments of convictions are entered as to both the defendant Dorszynski and the defendant Steinhoff.

Now, do I understand that sentencing is desired to proceed today?

MR. PODELL: That is correct, Your Honor.

COURT: And, again, Mr. Zastrow, are the Presentence Reports prepared?

MR. ZASTROW: We have completed the reports and they have been retained in our files until the plea of guilty was entered.

COURT: Thank you.

I have received now the Presentence Report and since —have you read it?

MR. PODELL: Yes, I have, Your Honor.

COURT: I have not read them, so we will have to adjourn while I take an opportunity to do that.

I think the record should also disclose that the court is satisfied that there is a basis in fact for the pleas of guilty in this case.

We will stand recessed.

(Whereupon a recess was taken, and after the recess the following proceedings were had:)

COURT CLERK: United States vs. Douglas Raymond Dorszynski. There is no case number.

This proceeding is for imposition of sentence. May we have the appearances, please?

MR. STADTMUELLER: Joseph P. Stadtmueller appearing for the United States.

MR. PODELL: Richard Podell appearing for the defendant, and the defendant himself.

COURT: Mr. Steinhoff, you can sit down for a few moments. I will entertain the sentence of Mr. Dorszynski at this moment.

Douglas Raymond Dorszynski, earlier today you entered a plea of guilty and were adjudged guilty as to a One-Count Information charging possession of 1,000 tablets of Lysergic Acid Diethylamide in violation of Section 844(a), Title 21 of the Code and Section 2, Title 18 of the Code.

Do you have any reason to advance why this court should not now proceed with the imposition of sentence?

DEFENDANT: No, I don't, Your Honor.

COURT: Is there anything you want to say in mitigation of sentence?

Do you understand what I mean by that?

DEFENDANT: Yes, there is a couple thing I'd like to say.

First, I know that it was stupid and it was wrong, and I cooperated with the arresting agency fully because of that, and I won't do it again.

COURT: Mr. Podell?

MR. PODELL: Yes, Your Honor, I'd like to just highlight a few points which I think are very material here, Your Honor.

I have discussed this matter on more than one occasion with the defendant, and I have informed him that under similar circumstances that it is highly probable that a defendant would receive a period of time in jail, would be incarcerated, because these are serious offenses. But, Your Honor, I feel that this case is different than the ordinary case under similar circumstances in that you have a young lad here who is just nineteen years of age with absolutely no prior record—nothing—and he does not come from a home which is easy, as many of the others who sometimes get in trouble.

This yound lad's father died six years ago; there are three other children at home; he had to work part-time going to school—sophomore at UWM, in good standing.

Your Honor, I do not see any reason, or any justification, or purpose that would benefit sending this young lad to jail.

When he said he has cooperated one hundred per cent with the authorities, that is exactly correct, Your Honor;

and I do not think that the Presentence Report fully went into this, Your Honor.

Officer Rabel of the Dangerous Drugs and Narcotics had this boy in his office on many occasions—fifteen to twenty times—helping him out; and he came down every time and helped out one hundred per cent.

You have had a person who, with no previous record, comes from a home which is not easy, three other children, no father, he has been working and in school, and he has admitted he did this—it was a stupid thing—but, Your Honor, he has tried to the best of his ability to make amends.

His mother is in court today, and I have talked to her on numerous occasions.

Your Honor, I would ask that the Court give him an opportunity to prove to this Court that he can make amends and that he will no longer or never again return to this court; and I'd ask that he be placed under probation—on probation under the Youth Corrections Act.

COURT: I will now proceed with the formal sentence.

Douglas Raymond Dorszynski, as of today you entered a plea of guilty and were adjudged guilty as to the offense of knowingly and intentionally possessing 1,000 tablets of Lysergic Acid Diethylamide in violation of 21 U.S. Code, 844(a).

The Court having asked the defendant why judgment should not now be pronounced, and no cause to the contrary appearing to the Court, and the defendant and his attorney having made statements in mitigation of sentence, it is the sentence and judgment of this court that you, Douglas Raymond Dorszynski, be committed to the custody of the Attorney General of the United States or his authorized representative for a period of one (1) year.

It is the further order of this court that the defendant be confined in a jail-type or treatment institution for a period of ninety (90) days and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for a period of two (2) years, probation to commence upon defendant's physical release from custody.

That's all of the formal sentence.

Now, I wanted to advise Mr. Podell that the record, in my opinion, fully acknowledges the fact that there was cooperation—

MR. PODELL: Your Honor, my only—

COURT: Let me finish my statement. (Continuing) —that there was cooperation with the prosecution and that Mr. Rabel reported—who is a narcotic agent I understand—Mr. Dorszynski had cooperated with the agents, and further that Mr. Stadtmueller represented that the defendants were charged with misdemeanor only because of their cooperation, so that that point was completely known to the court.

Something you want to say?

MR. PODELL: Yes, Your Honor. That when I read the Presentence Report and I checked with Mr. Rabel, he informed me at that time that no one had mentioned or even discussed the matter with him, and I only pointed this out, Your Honor, because I feel that this lad, with no prior record whatsoever, went out of his way and to help out as much as possible realizing it was a serious offense.

COURT: Thank you. That's all.

Motion Dated April 7, 1972 By Attorney Michael Jan Steckelis

(Formal parts omitted)

Comes now Michael Jan Steckelis, 326 South Hamilton Street, Madison, Wisconsin, attorney for the above-named defendant, and respectfully moves the court as follows, to wit:

1. That said defendant be allowed to withdraw his plea of guilty in the above entitled cause.

2. That a trial be held in the above entitled cause before a twelve (12) man jury.

3. That said actions be taken because (a) said defendant had a misapprehension of the law, the facts surrounding his case, and the consequences of a conviction

for the alleged crimes; (b) said defendant was persuaded by arguments of taking the most expeditious alternative rather than arguments of guilt or innocence; and (c) such action would be in the furtherance of justice.

Affidavit In Support of Steckelis Motion

(Formal parts omitted)

Michael Jan Steckelis, being first duly sworn, on oath deposes and says:

1. That he is the attorney for the above named defendant, Douglas Raymond Dorszynski.

2. That your affiant is informed and believes that on February 14, 1972 said defendant plead guilty in United States District Court Eastern District of Wisconsin to a charge of unlawful and knowing possession of a thousand tablets of Lysergic Acid Diethylomide, a Schedule I Controlled Substance, not having been previously obtained such substance directly from or pursuant to a valid prescription or order by a practitioner while said practitioner was acting in the course of his professional practice, all in violation of Sections 844(a), Title 21, United States Code and Section 2, Title 18, United States Code.

3. That your affiant is informed and believes that the judge presiding in the above-entitled cause, the Honorable Myron L. Gordon, sentenced said defendant to be committed to custody of the Attorney General of the United States or his authorized representative for a period of one (1) year, that he be confined in a jail or institution for ninety (90) days, and that the remainder of the sentence be suspended and the defendant placed on probation for two (2) years.

4. That your affiant is informed and believes that said defendant had a misapprehension of the law, the facts surrounding his case, and the consequences of a conviction for this crime.

5. That your affiant is informed and believes that said defendant was motivated by statements of his attorney and the United States Attorney that pleading guilty was his most expeditious alternative under the circumstances and not by a true belief in his own guilt.

6. That your affiant believes that justice could be better served if questions of said defendant's guilt were left to a jury.

7. That your affiant makes this affidavit in support of a requested order allowing the defendant to withdraw his plea of guilty.

MOTION FOR RELEASE FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255 DATED APRIL 27, 1972

(Formal parts omitted)

The defendant DOUGLAS DORSZYNSKI by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY by ROBERT H. FRIEBERT hereby moves the court for the entry of an order releasing the defendant from custody pursuant to 28 U.S.C. Sec. 2255 on the grounds that the defendant's plea of guilty was not voluntarily entered and that said plea was the product of promises, inducements and coercion in that the defendant was told by Officer Rabel from the Dangerous Drugs and Narcotics Division that he would receive a sentence of probation under the Federal Youth Corrections Act if he cooperated with the Federal Authorities and further if he entered a plea of guilty to the charge. Furthermore, the plea was in violation of Rule 11 and *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969) in that the defendant was not advised by the court that by entering a plea of guilty he was waiving his privilege against self-incrimination.

The defendant respectfully requests that the court cause notice to be served upon the United States Attorney and grant a fact finding hearing. The record in this case does not disclose that the defendant is entitled to no relief. The defendant respectfully asserts that his responses to inquiries from the court that he was not

promised anything if he pled guilty and was not told what his penalty would be were prompted by the promises asserted above. The defendant respectfully alleges that he was told to respond in this fashion.

MOTION TO WITHDRAW A PLEA OF GUILTY
DATED APRIL 27, 1972

(Formal parts omitted)

The defendant DOUGLAS DORSZYNSKI by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY by ROBERT H. FRIEBERT hereby moves the court pursuant to Rule 32(d) for the entry of an order withdrawing his plea of guilty to correct a manifest injustice. The defendant respectfully asserts that his plea of guilty was coerced and was the product of promises and inducements made to him by Officer Rabel of the Dangerous Drugs and Narcotics Division to the effect that if he cooperated with the Federal Authorities and entered a plea of guilty that he would receive a sentence of probation pursuant to the provisions of Federal Youth Corrections Act. As a result of said inducements of Officer Rabel, the defendant asserts that he cooperated with the Federal Officers and entered a plea.

The defendant also asserts that he is entitled to withdraw his plea of guilty because he was not advised by the court that the entry of the plea of guilty had a result of waiving his privilege against compulsory self-incrimination as required by Rule 11 and *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

MOTION FOR REDUCTION OF SENTENCE
DATED APRIL 27, 1972

(Formal parts omitted)

The defendant DOUGLAS DORSZYNSKI by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY by ROBERT H. FRIEBERT hereby moves the court pursuant to Rule 35 for the entry of an Order reducing the sentence previously imposed upon him.

SUPPLEMENTAL MOTION TO WITHDRAW A PLEA OF GUILTY, FOR A REDUCTION OF SENTENCE, AND TO BE RELEASED FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255 DATED MAY 1, 1972

(Formal parts omitted)

The defendant DOUG DORSZYNSKI, by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY, by ROBERT H. FRIEBERT, hereby additionally moves the court for relief pursuant to Rule 32(d), Rule 35, and 28 U.S.C., Sec. 2255, on the additional grounds that the defendant was not advised that he was subjecting himself to incarceration for a period of six years by entering a plea of guilty pursuant to the Federal Youth Corrections Act in violation of Rule 11, and, further, the court did not make any finding that the defendant would not derive benefit from treatment under 18 U.S.C., Sec. 5010 (b) or (c), in violation of 18 U.S.C., Sec. 5010 (d). The court was, therefore, without jurisdiction to impose a sentence as provided in 21 U.S.C., Sec. 844 (a). See *United States* v. *Waters*, 437 F.2d 722, 724 (D.C. 1970) and *United States* v. *Howard*, 449 F.2d 1086, 1092, (D.C. 1971).

PROCEEDINGS UPON HEARING TO VACATE PLEA OF GUILTY, RELEASE FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255, FOR REDUCTION OF SENTENCE, AND ON SUPPLEMENTAL MOTION TO WITHDRAW PLEA OF GUILTY, FOR A REDUCTION OF SENTENCE AND TO BE RELEASED FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255 DATED JUNE 2, 1972

COURT: It's my intention to dispose of all pending motions in this matter; and if counsel have any evidence to present in connection with the pending motions, anything they may choose to, proceed.

MR. FRIEBERT: Your Honor, there were — there would be a necessity for an evidentiary hearing with respect to the—that aspect of the Defendant's motion to withdraw a plea of guilty, or his 2255 motion, which asserts that there were certain commitments made to him

with respect to his plea. That's the only motion which would compel testimony.

I believe that the other motions perhaps if resolved prior to that, might obviate the necessity of such a fact hearing. For example, if the Court were to consider the motion favorable to the Defendant with respect to his motion to adjust sentence, I think that that would obviate the necessity of a fact hearing. Likewise,—

COURT: I think we should hold our fact hearing, Mr. Friebert.

MR. FRIEBERT: A—

COURT: That's why we scheduled this hearing this morning. If you have any facts you want to adduce, this is the time.

MR. FRIEBERT: I would like to, if I may, address myself to another aspect of the motions. There is an assertion that the record itself does not disclose a compliance with Federal Rule 11 and with *McCarthy* v *United States.*

COURT: That's a question of law, though; and I don't think there is any problem the Court has to take evidence on. Would you please proceed with your proof?

MR. FRIEBERT: Can I ask that Mr. Raebel be asked to leave the courtroom during the course of this testimony?

COURT: Any objection to that?

MR. STADTMUELLER: I have no objection, Your Honor.

MR. FRIEBERT: Mr. Dorszynski.

DOUGLAS DORSZYNSKI, having been first duly sworn on oath, testified as follows:

COURT CLERK: Would you please state your full name and spell your last name for the record?

THE WITNESS: Douglas Raymond Dorszynski, D-o-r-s-z-y-n-s-k-i.

COURT CLERK: Okay, please be seated.

DIRECT EXAMINATION

BY MR. FRIEBERT:

Q Would you state your name, age, and address?

A Douglas Raymond Dorszynski, I'm 20 years old, and my address is 2597 South Austin Street.

Q Mr. Dorszynski, you are the Defendant in this case; is that correct?

A Yes, sir, it is correct.

Q And do you recall appearing before this Court on February 14, 1972?

A Yes, I do.

Q And at that time, you were represented by counsel; is that right?

A Yes, it is.

Q And what was his name?

A Mr. Richard Podell.

Q Now, on that date you entered a plea of guilty; is that correct?

A Correct, right.

Q And were sentenced; is that correct?

A Also correct.

Q And as part of that sentence you were committed to a term of 90 days, which you have now completed; is that correct?

A Yes, it is correct.

COURT: That's not quite correct, is it?

MR. FRIEBERT: I was about to say he is presently on probation.

COURT: All right. Go ahead.

MR. FRIEBERT:

Q And you are presently now on probation in accordance with that sentence?

COURT: He was not sentenced to 90 days. He was sentenced to a year.

MR. FRIEBERT: I'm sorry.

COURT: And I'm nitpicking, of course, but I think the record should show it was a year, of which he was required to serve a split term of 90 days and the balance on probation. Is that not your understanding?

MR. FRIEBERT: That's my understanding.

Q You have completed your period of incarceration as ordered on February 14th?

A Yes, I have.

Q Now, prior to February 14, 1972, did you have any conversation with a Mr. Raebel?

A Yes, I have.

Q All right, what was the nature—when was your first contact with Mr. Raebel?

A The day that we set bail for me and Mr. Steinhoff.

Q And was that the day after you were arrested on the day of your arrest?

A The day after.

Q And what month was that?

A August I think, August 20th.

Q Well, you were arrested in August or October?

A On—October, October 20th.

Q Of what year?

A 1971.

Q Where did you first meet Mr. Raebel?

A Well, at the Federal Building that night.

Q That night of your arrest?

A Right.

Q And who were you with when you first met Mr. Raebel?

A I was with Barry Steinhoff.

Q And did you have conversation regarding your case at that time with Mr. Raebel?

A Yes, we did.

Q Would you relate that conversation?

A Well, he wanted to know where I got the drugs from, and he told me that I should cooperate and if I cooperated, you know, he would cooperate with me. And so I told him that I come in and made telephone calls to this number that I had from Oklahoma and—

Q This is that first conversation you are relating with Mr. Raebel?

A Right.

Q Did he make any reference of more to explain what he meant that he would cooperate?

A Well, he told me that he's handled hundreds of cases, and he said first possession you—just a minute—first possession you get—the first offense with possession of dangerous drugs would usually—gets probation, and he said that he asked for this Youth Corrections Act.

Q Did he explain what the Youth Corrections Act was?

A He told me that it was—after I was done with my probation, that the conviction is just wiped off the record.

Q Did he or did anybody ever tell you that under the Youth Corrections Act you could be subjected to approximately six years of combined probation and custody?

A No, no one ever told me that.

Q When was the first time you ever heard that?

A I heard it from you in a letter—a motion or whatever it was.

Q What else occurred during that first conversation?

A Well, I explained where I, you know, got the drugs from and—

Q Did you sign a statement?

A Yes, I did sign a statement.

Q Was there any discussion as to whether you should be charged with a felony or misdemeanor at that time?

A Yes, there was. He told me if I cooperated, he would give me a misdemeanor, charge me with a misdemeanor.

Q What was your understanding of what he meant by the word "cooperated" on your part?

A Well, I thought that I had to come in and get ahold of this guy from Oklahoma and tell him that I would send somebody out there to buy some drugs from him, and that was probably the main thing, and I had to just go to court. He said I'd go to court as soon as I got done with the telephone because I didn't complete—because I couldn't get in touch with the guy.

Q You were then released on bail; is that right?

A On my own recognizance, right.

Q Pardon?

A On my own recognizance.

Q And you continued to see Mr. Raebel after you were out on bail; is that right?

A Yes, it is. I saw him about 15 times.

Q Would you relate what you did during those meetings as best you can?

A Well, I usually met him at 5:30 at night.

Q Where?

A In Office of Dangerous Drugs.
Q In this office?
A In this building, right.
Q And what happened?
A And then we'd go in this back room and he'd bring out this little tapper for a telephone and I'd call this number up, and every time we called we could never get ahold of anybody. It was either no one was home or this guy I wanted to talk to wasn't home. So I kept on coming in and coming in like that, at 5:30 usually.
Q Was this at his request?
A Yes, it was.
Q And during those times when you came in, did you have conversations with respect to what would happen to you?
A Yes, we would have.
Q Would you relate those conversations during that period?
A Well, he really told me that there was really nothing to worry about, like when it came to jail, you know, he says, you know, you're helping us; and like I said, first possession case I figured I would be on probation. And I kept on like asking him this and he'd always just say nothing to worry about, nothing to worry about.
Q And did—was there any other further conversation regarding the Federal Youth Corrections Act?
A Yes, there was. He told me that I could qualify for it, and he wasn't sure so I asked him if I could check into it. He thought if—just if I had a felony against me. He checked into it; and like I came in two days later, whatever it was, he told me I could get it.
COURT: I didn't hear that. He told you what?
THE WITNESS: That I qualified for it with a misdemeanor, and he told me that he would try to come and get it, this Youth Corrections—

MR. FRIEBERT:

Q Did he say how he would try and help you get it?
A He said he would personally ask the Judge.
Q Now, did you ever—did you make all of your meetings promptly and when Mr. Raebel wanted you to be there?

A No, I missed one meeting.

Q What did—did that occasion any further conversation between you and Mr. Raebel regarding your future?

A Yes, it did. He told me that he didn't want to fool around with me and if I'd keep on missing a meeting—it was the only one I missed, though—he was going to issue a felony against me.

COURT: A what?

THE WITNESS: A felony.

MR. FRIEBERT:

Q Do you recall when that meeting was or when that conversation occurred?

A It was about—it was about the fourth time I was there, and that must have been three weeks after I was arrested probably then, around then.

Q Now, Mr. Dorszynski, as a result of these conversations, did you develop an impression as to what would happen to you in court?

A Yes, I did. I thought that I was going to get probation term, and I wasn't sure whether it was the Youth Corrections Act.

Q What were your thoughts as to—with respect to the Youth Corrections Act?

A Well, I thought there would be a good chance I could get it.

Q And what did you base that feeling on?

A On that when I came in, like I said, it was 15 times, whatever, and—

COURT: Will you read that answer.

(Whereupon the last answer was read.)

COURT: Have you completed your answer?

THE WITNESS: No, I haven't.

COURT: Go ahead.

THE WITNESS: Would you please read that again.

(Whereupon the last answer was read.)

THE WITNESS: And he gave me the impression like there was really nothing to worry about. There was something to worry—but when it came to jail—

MR. FRIEBERT:

Q Did the word "cooperation" and—include in your mind any action on your part with respect to how you would plead in court?

A Right. I thought cooperation meant all the way through, you know, just plead guilty. The plea was part of it, yes.

Q What do you think would have happened had you pled not guilty?

A Well, I'm not really sure. I don't know—might have been issued with a felony again. I don't know.

Q Did you feel that that would have an impact with respect to what a sentence would be?

A Yes, it would. Jail probably.

Q Now, Mr. Dorszynski, on February 14, 1972, certain questions were propounded to you by the Court. Do you recall that?

A Yes, I do.

Q And now, when the Court stated to you: "Has anybody exercised any pressure on you to plead guilty?" and your answer was: "No, sir," do you recall being asked that question and making that answer?

A Yes, I do.

Q Do you believe that that answer is in any way inconsistent with your testimony today?

A No, not really. It wasn't really pressure. It was like—like it—made it seem like there was nothing really —that there was no really big deal, you know, like—I don't know how to say this—like he didn't really pressure me to plead guilty, you know, it was part of the cooperation I figured that I plead guilty.

Q All right, then the Court asked you the following question: "Did anybody make any promises to you what would happen if you did not plead guilty?" And your answer was: "No, sir." Do you recall being asked that questions and giving that answer?

A Yes, I do.

Q Do you believe that that is inconsistent with what you have testified to here?

A No, I don't.

Q Would you explain that?

A Well, that's about the same thing, like nobody ever said that, nobody ever really came out and said anything either way. It was just—just the way people talked, you know, like we'll help you. No one ever said if you do this, we are going to get this for you. No one ever stated that. There was no really promises. It was more round-about thing-a-ma-jig.

Q Did you have—did you have any doubt as to what would happen to you, though, prior to your appearance in court?

A I thought I would be going home the same day. I thought I'd get probation.

Q And then, you were asked any question—strike that—"Any threats or promises?" And you said: "No, sir," and that was I think a continuation of the last question. Then the next question was: "Do you think arrangements have been made with the court as to what your penalty would be?" Your answer was: "No." Do you recall being asked that question and responding in that manner?

A Yes, I do.

Q Do you believe that is in any way inconsistent with the way you testified today?

A No, I don't think that there were any—that the Court had anything to do, you know, any—whatever—I don't know. I thought that it was just the way to do things. I thought if I cooperated, that would—that would have happened, you know, I would have got probation. I thought that was the way of doing things.

Q As a matter of course, that was the way?

A Right.

Q What did you base that opinion or feeling on?

A Well, a lot—just thought that was going to happen, like Mr. Raebel and my attorney, former attorney—

MR. FREIBERT: That's all.

CROSS-EXAMINATION

BY MR. STADTMUELLER:

Q Mr. Dorszynski, you related earlier that Mr. Raebel indicated to you that he would contact the Judge

personally about your being placed on probation under the Federal Youth Corrections Act; is that right?

A That's what he told me that is what he would do.

Q When did this conversation take place?

A I'm not really sure of the date. Must have been about the 7th or 8th time I was in his office to make these telephone calls we naturally started talking, you know, to each other.

Q Yet your telephone calls weren't bringing any results, were they?

A No, they weren't.

Q And in spite of that, you say that this 7th or 8th time Mr. Raebel told you he'd contact the Judge about placing you under probation under the Youth Corrections Act; is that right?

A Yes, it is.

Q Did you ever ask Mr. Raebel if he ever in fact contacted the Judge or attempted to do so?

A No, I haven't seen him after that. When I saw him—couple times after that—but I haven't seen him after the Court—after February 14th.

Q Did he ever tell you what Judge he would contact?

A No, no. We weren't scheduled for any court. He wouldn't schedule me till after the phone calls were made or something was rescheduled.

Q When did you understand that this contact with the Court would be made?

A After I completed the telephone call.

Q Before any scheduled court appearance; is that right?

A Right.

Q So at the time you entered your plea you really had no idea whether anybody contacted the Court or not, is that right, that is Mr. Raebel?

A No, I didn't, no, no.

MR. STADTMUELLER: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. FRIEBERT:

Q Mr. Dorszynski, you stated in one of your answers on cross that something would be scheduled. Would you explain that answer? What do you mean by "something would be scheduled"?

A Well, the Court would reschedule it after I made telephone calls. That's what I meant. See, he told me as soon as I completed the telephone call, I could go to court, and not until after I completed them.

Q The time that the statement was made to you by Mr. Raebel, you had or made—strike that. After the statement was made to you by Mr. Raebel, you continued going to see him and making these phone calls; is that right?

A Yes, sir, I did.

MR. FRIEBERT: All right, that's all.

MR. STADTMUELLER: Nothing further, Your Honor.

COURT: So that when you were here in the courtroom for sentencing, you were under the impression that Mr. Raebel had arranged with me for your being put under the Youth Corrections Act; is that correct?

THE WITNESS: No, I thought that—well, he told me that he had to see the pre-sentence—the Probation Department, and I thought, see, I asked him, well, can you get this for me. He said I'll ask the Judge personally. I don't know that he asked or not.

COURT: You hoped he had?

THE WITNESS: I hoped this.

COURT: So that at the hearing I asked you the questions, "Do you think arrangements have been made with the Court as to what your penalty would be," and you answered that no?

THE WITNESS: I didn't think it was arrangement. He said he would ask if he—he wasn't going to arrange. He was going to ask. You know, sort of character witness, you know.

COURT: Any other questions?

MR. STADTMUELLER: I have none, Your Honor.

COURT: All right, you can step down, Mr. Dorszynski. Anything else from the Defendant?

MR. FRIEBERT: No, we have no further witnesses.

MR. STADTMUELLER: Your Honor, I'd like to call Mr. Raebel to clarify a few items. I believe he's out in the hall. I'll proceed to get him.

WILLIAM W. RAEBEL, having been first duly sworn on oath, testified as follows:

COURT CLERK: Would you please state your full name and spell your last name for the record?

THE WITNESS: William W. Raebel, R-a-e-b-e-l.

DIRECT EXAMINATION

BY MR. STADTMUELLER:

Q Mr. Raebel, would you state again your full name, please?

A William W. Raebel.

Q And by whom are you employed, sir?

A U. S. Justice Department, Bureau of Narcotics and Dangerous Drugs.

Q In what capacity are you so employed?

A Presently the Acting Special Agent in charge of Milwaukee District Office.

Q Mr. Raebel, were you employed by the Federal Bureau of Narcotics and Dangerous Drugs on October 20, 1971?

A I was.

Q And directing your attention to that date, did you have occasion to come into contact with the Defendant in this matter, Douglas Raymond Dorszynski?

A I did.

Q Do you see him here in the courtroom today?

A Yes, I do.

Q And he is seated with his counsel?

A Yes, he is.

Q Mr. Raebel, would you relate to the Court what happened when you first came in contact with Mr. Dorszynski on October 20, 1971?

A It was on South Howell Aveue, I believe, in the 2300 block on—at Frosty's Grill. Other agents of the Milwaukee District Office arrested Mr. Dorszynski.

Q What happened to him after the arrest?

A He was brought in to the Milwaukee District Office here on the second floor of the Federal Building.

Q For what purposes was he brought in to the Milwaukee District Office?

A For processing, for fingerprinting, and photographing.

Q Did you have occasion to have a conversation with Mr. Dorszynski on the evening of October 20th at your offices here in the Federal Building?

A Yes, sir, I did.

Q Would you briefly outline the nature of that conversation?

A I gave him a form, which was a standard form for a Bureau, which was a waiver of rights. I gave him his rights, and I asked him if there was anything he wanted to say.

Q And what, if anything, happened after that?

A He told me the story behind the sale—or behind his arrest, and he gave a sworn statement.

Q After this statement was given, Mr. Raebel, what, if anything, did you tell Mr. Dorszynski at that time and place?

A I told him that all this cooperation would be brought to the attention of the U. S. Attorney.

Q Did you make any other statements to him at that time relative to this mater of cooperation?

A No, sir, I didn't.

Q Did you—did he give you any indication as to how he would cooperate?

A Well, he intended on placing a call to the source of supply. It was in Oklahoma City, and he would tell the source of supply that he was sending down somebody to to pick up a quantity of LSD for him.

Q And were attempts made by Mr. Dorszynski to place those phone calls?

A Yes, sir, they were.

Q How many occasions did that take place, or how many times did that take place?

A I'm not sure of the number. There must have been a dozen attempts to make that call.

Q Were any of them ever successful?

A No, he came in after one call and said that he had received several calls at his residence, and shortly after that time we were unable to get ahold of anybody in Oklahoma City.

Q When would Mr. Dorszynski come in to make these calls, Mr. Raebel, what time of the day?

A In the afternoon, late afternoon, between 4:30 and sometime 6 o'clock.

Q And how long would he stay at your offices in connection with placing these calls?

A Matter of ten, fifteen minutes at the most.

Q Now, you indicated that you had relayed to Mr. Dorszynski the fact that his cooperation would be called to the attention of the United State Attorney; is that correct?

A Yes, sir, I did.

Q Did you at any time in connection with your contacts with Mr. Dorszynski subsequent to his arrest on October 20, 1971, indicate to him that his cooperation would be called to the attention of any other body or agency?

A No, sir, I didn't.

Q During any of your contacts with Mr. Dorszynski, Mr. Raebel, did you have occasion to discuss with him the procedure of ramifications of what is commonly known as the Federal Youth Corrections Act?

A No, sir, I didn't.

Q Are you aware personally what the Federal Youth Corrections Act is?

A Basically.

Q Mr. Raebel, at any time during your contacts with Mr. Dorszynski subsequent to his arrest on October 20, 1971, did you have occasion to discuss with him calling to the attention of a Judge anything with respect to this case?

A No, sir, I didn't.

Q Mr. Raebel, did you at any time have any conversation with Mr. Dorszynski with respect to the alterna-

tive of his being charged with a misdemeanor as opposed to a felony?

A Yes, sir, I did.

Q What, if anything, did you state to him in that regard?

A I told him at the time he was arrested under the new law he could be charged either with a felony or with a misdemeanor.

Q And he was in fact charged with a misdemeanor; is that right?

A Yes, sir, he was.

Q Did at any time—strike that. Did you at any time explain to Mr. Dorszynski why he was charged with a misdemeanor rather than the felony?

A No, sir, I didn't.

MR. STADTMUELLER: I have no further questions of the witness.

CROSS EXAMINATION

BY MR. FRIEBERT:

Q Mr. Raebel, would you explain what your understanding is of the Federal Youth Corrections Act—you said you knew a little bit about it. What do you know about it?

A Well, I understand that there is a period of time when the Defendant is charged, he serves out his sentence, whatever his sentence may be, and at age 21—or now I'm not sure what age it is—in Wisconsin he could make a motion to the Court and have the charge taken off of his record.

Q Can the Federal Youth Corrections Act be used with a misdemeanor case, do you know?

A I have no idea.

Q Did you ever check on that in the course of your conversations or relationship with Mr. Dorszynski?

A No, sir, I didn't.

Q Now, you had, say twelve times at least or more that Mr. Dorszynski came in to make telephone calls?

A About twelve, about a dozen times I believe.

Q And during that time, did you have conversations with Mr. Dorszynski?

A I very seldom had a conversation with Mr. Dorszynski. The only time when I had a lengthy talk with him was the night of his arrest, and after that I was too busy. Another agent would handle it in the office.

Q Who was that?

A We had many agents whenever he came in.

Q Name one.

A Agent Streicher.

Q Any other agents?

A I don't know who handled him at the time.

Q But he would report to you, and you would give him to another agent?

A He would come in—

Q To make the phone call?

A He would come in, and he would ask for me, and I would give him to another agent to go in the back room and place the call, yes.

Q You would personally see him every time?

A Not every time, but I saw him quite often.

Q How, sir, do you know he was there a dozen times or more?

A Well, I only estimated a dozen times. I know he was in the office. They would tell me that he had been out there, that he was waiting at the front desk. On other occasions we would get a call from the guard on the west side of the building telling us he was there, and someone would go down and get him.

Q That's your impression, that it's a dozen or more?

A Yes.

Q And you did not—it's your testimony you did not see him on every occasion?

A No, sir, I did not.

Q Besides Agent Streicher who else assisted Mr. Dorszynski in this work?

A I don't know.

Q But you know of Mr. Streicher; is that right?

A Yes, sir, I do.

Q It's your testimony you had no conversations with Mr. Dorszynski after the first night of his arrest?

A No, sir, I didn't say that.

Q What kind of conversations would you have with him—strike that. Did you have any conversations with respect to what would happen to Mr. Dorszynski in this case?

A Not with Mr. Dorszynski, no, sir.

Q Did you have any conversations with his lawyer?

A Yes, I did.

Q What did you tell his lawyer about what would happen to him in this case?

A I didn't tell him anything about what would happen to him.

Q Did you—did Mr. Dorszynski appear to you to be in any way concerned about his future?

A Yes, he did.

Q How did he manifest that concern to you?

A He told me unless I released his car to him, that he would not be able to go to school, he could no longer come in and make his telephone calls and he was through.

Q What did you say?

A I told him the car was a defendant. It was being investigated. It would be either returned to him or forfeited to the Government.

Q What happened to the car ultimately?

A It was returned to the owner, the registered owner, which is his mother.

Q It was not forfeited; is that right?

A No, sir, it was not.

Q Did he seem concerned about what would happen to him with this case?

A He didn't express it to me.

Q Never expressed any concern to you about what would happen to him in this case?

A No, sir.

Q Is that your testimony?

A That's it.

Q On the first night, did you explain to him that this could be a misdemeanor or a felony?

A Yes, I did.

Q And did you explain to him that consideration would be given for misdemeanor if he cooperated?

A I told him that I would bring to the attention of the U. S. Attorney any cooperation.

Q Do you think—did you tell him that that cooperation could lead to a misdemeanor charge?

A No, sir, I did not.

Q Did you tell that to his lawyer?

A No, sir, I didn't see his lawyer at that time.

Q Did Mr. Dorszynski make every meeting when he was supposed to be there?

A No, sir, he did not.

Q How many did he miss? Do you know?

A I have no idea. There was a period of time when Mr. Dorszynski didn't come in at all.

Q Did you have any conversation with him with respect to his missing a meeting or meetings?

A No, sir, I did not.

Q Did you tell Mr. Dorszynski that if he didn't show up when he was supposed to, he would be charged with a felony?

A No, sir, I did not.

Q Did you tell Mr. Dorszynski that it's been your experience that first offenders—by the way, Mr. Dorszynski doesn't have a record; is that right?

A I'm not sure. I'd have to look that up.

Q Did you tell Mr. Dorszynski that at any time, or did anybody tell Mr. Dorszynski in your presence that it's been generally your experience that first offenders be charged with the misdemeanor and get probation?

A No, sir, I didn't say it, nor was it said in my presence.

Q Have you had any conversation with the United States Attorney or Assistant United States Attorneys with respect to the motions that have been brought in his case which we are hearing today?

A Yes, I did.

Q During part of that conversation did you ever discuss that if this plea were opened up, he would be charged with a felony?

A No, sir, there was no such statement made.

Q Was it discussed?

A No, sir.

MR. FRIEBERT: That's all.

MR. STADTMUELLER: I have no further questions, Your Honor.

COURT: Did you say anything to Mr. Dorszynski to the effect that he had nothing to worry about as far as going to jail is concerned if he cooperated?

THE WITNESS: No, sir, I did not.

COURT: Anything else of the witness?

MR. FRIEBERT: No.

MR. STADTMUELLER: Nothing, Your Honor.

COURT: Thank you. You're excused, Mr. Raebel.

(Witness excused.)

COURT: Anything else from the Government?

MR. STADTMUELLER: I have nothing to add, Your Honor.

COURT: Any rebuttal proof or any other testimony you want to offer, Mr. Friebert?

MR. FRIEBERT: No.

COURT: I take it then that both sides have submitted all the evidence that they want to submit as to any of the motions before—

MR. FRIEBERT: I presume the transcripts are a matter of record?

COURT: Yes, I have the transcript of the—of a sentence proceedings 14th of February, 1972. That's the one you had reference to?

MR. FRIEBERT: I believe there's another one, which —I believe the record of the bail hearing—which we don't have a transcript—I don't know if that's been filed.

COURT: I don't know that either. It's not of special moment, is it?

MR. FRIEBERT: I don't think so.

COURT: I have no objection with it being made a part of the file, but I'll leave the burden to you, Mr. Friebert, of physically causing it to be put in the file if you want.

MR. FRIEBERT: Fine. I just was inquiring. I don't thing it adds or has any impact on our discussion here.

COURT: Now, I'll be glad to entertain counsel's comments either on this motion or on the *McCarthy* Rule question that is implicit in one of the other motions, or any other matters that counsel wish to be heard on.

Mr. Friebert?

MR. FRIEBERT: Your Honor, I believe that guilty pleas are fraught with difficulties in the system. The problem with guilty pleas is that some people—and many people—believe, and I think wrongly, that there is something wrong with making deals within the system. I read many articles on it, as I am sure the Court has, and I have been involved in many debates. I personally put on the record every aspect of every understanding and deal that I am engaged in with respect to a guilty plea. I believe that many lawyers do not put these matters on the record.

I think Mr. Dorszynski was motivated by the innuendoes and unwritten word and knowledge of cooperation leading to consideration. It's inconceivable to me that—that since these events would go on and that a misdemeanor would be picked instead of a felony unless cooperation is indeed a feeling that a plea of guilty must follow.

I have advised my client that should we be successful in this motion, he should be aware that there is a possibility that he would be charged with a felony. I think that's the system. I think that that is something that any lawyer would have to advise his client. I think that Mr. Dorszynski understands this and understands that aspect of it all.

I think that there is truth in his testimony to the effect that things were said to him—that they weren't said in the quid pro quo, if you do this, this will happen; if you cooperate, I will do this. I think that conversations occurred. They're natural conversations, and they are conversations which law enforcement officers engage in all the time. I don't think there should be any secret about it. I think the problem is that questions are propounded by the Court which have slightly different context, and almost questions are in the context of a flat out promise.

But the man was put through the system, and I think his testimony is clear and believable, that he thought he would get probation and that he would have a very strong and good chance for Federal Youth Corrections.

One of the interesting sidelights at least on it is that Mr. Dorszynski said that he asked Mr. Raebel about the Federal Youth Corrections Act and Mr. Raebel—he said he didn't know if it could apply in a misdemeanor case. And Mr. Raebel said he knew something about the Act. What he didn't know about it was that he didn't know whether it would apply in a misdemeanor case.

But aside from that, Your Honor, I think that that stands behind every guilty plea, expectations versus as to when it crosses the line to a commitment in the mind of the Defendant. We are talking about the voluntariness of his plea. In this context and in this background, it is what goes on in his mind that's important, and not really the words that surround the development of his feeling on it.

He had a feeling that he would be given probation, and it's an understandable one in light of all of the surroundings of the case—misdemeanor as opposed to felony —all of his cooperation would be brought to the attention here by Mr. Raebel to the United States Attorney; and I think there are certain germs of truth, if not that Mr. Dorszynski understood by the language, that this would be brought to the attention of the Court.

Indeed at the very conclusion of the case, Mr. Dorszynski's counsel at that time and the Court engaged in a colloquy regarding whether the Court understood that there was cooperation, and the Court stated flatly that it did understand it. Obviously what everybody is saying is that this has to be considered. That's about all I want to say on that point.

On the *McCarthy* aspects of it, I believe that the transcript does not disclose compliance with the *McCarthy* v. *United States*. The Wisconsin Supreme Court in a recent advance sheet in *McAllister* v. *State*, at 54 Wis. 2d 224, overturned a guilty plea as not being in compliance with *McCarthy* and *Boykin* because there was no showing on the record that the Defendant understands the nature of

the crime with which he is charged. The Wisconsin Supreme Court has interpreted *McCarthy* to mean precise, on-the-record compliance. The record does not disclose the Defendant was specifically asked whether he understands that he waived his right against the self-incrimination by the entry of a plea, and I think that *McCarthy* means that that question specifically has to be asked of the Defendant, and that nothing can be left to an assumption or presumption that counsel told him all this or he understands all of this. He has to be told what his rights are, that he is waiving certain basic rights, and that's one of them specifically mentioned by *McCarthy*, and I think that that ought to be followed.

The standard practice of—book on jury instructions for the State of Wisconsin on the taking of guilty pleas states that that question ought to be requested. It's one of the questions that is written in State Practice to comply with *Boykin* and *McCarthy*.

Beyond that, the Defendant was not advised that he could be sentenced under the Federal Youth Corrections Act and as to what the impact of such a commitment might be. Mention of the Federal Youth Corrections Act is made in the record by Mr. Stadtmueller, in which he states very early—I believe at page 3—he said: "In addition, as one or both of these defendants may be under the age of 26, they may also be subject to the Federal Youth Corrections Act." There is no follow-up statement as to what a commitment under the Federal Youth Corrections Act means. He is asked whether he understands that he's subjecting himself to a penalty and that the penalty is a year, but the Federal Youth Corrections Act goes beyond that, even for a misdemeanor, so he wasn't advised as required by *McCarthy* as to what the potential penalties were as evidenced by this particular plea. And I think that that's a defect in the entry of the plea which *McCarthy* requires.

Finally, the Court did not make a finding this Defendant is under the age of 22, which means he was "mandatorily"—in quotes—that is the question that is before the Court—to be considered for commitment under the Federal Youth Corrections Act. The Act itself specifi-

cally states, as pointed out in the motion—supplemental motions to withdraw a plea of guilty—that the Court under Section 5010(d) must make a specific finding that the Defendant would not derive benefit from treatment under the Federal Youth Corrections Act. The Act itself is a—quite specific. The language could not be more specific. It says, and I'll quote it:

> "If the court shall find that the youth offender will not derive benefit from treatment under Subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

The word "shall" in the context of that statement is—appears to be mandatory, that before the Court can sentence the youth offender under the adult act, the Court must find and make a finding that the Defendant or young—youth offender will not derive benefit from treatment under the Youth Corrections Act.

I pointed out and I am sure the Court has read the two cases upon which I rely from the District of Columbia Court of Appeals, which interpret that provision as mandatory. This record does not have any findings by the Court whatsoever with respect to the fact that this Defendant would not derive benefit under the Federal Youth Corrections Act; and, therefore, the sentencing proceeding at least is not valid. It kind of intertwines with the plea in that he wasn't told he could be sentenced under that Act and the Court did not make a finding under the Act, and those two things really mesh with each other in a way that I think either if the Court makes a finding, for example, that under the motion to change the plea, that he should be sentenced under the Act, then perhaps the plea is invalid because he wasn't told that he could be sentenced under the Act and what that means. And it really kind of dovetails into each other in a way that compels I think a withdrawal of the plea, or in lieu of a commitment under the Act, a statement from the Defendant that he understands that in some way, to put this together so that the Defendant is—derives maximum benefit under the Act.

Now, the Federal Youth Corrections Act—I have a brief of the Government on a case that is up on appeal in the Fourth Circuit, which I believe has been filed with the Court, in case of *Cox* v. *United States.* A copy has been given to me.

Now, that brief is interesting in that there is a lot of very sketchy legislative history propounded by the Government. The problem with legislative history is that you can go to it if it's clear from the language of the statute as to what Congress said. It says if the Court shall find the youth offender will find benefit—it's a clear statement that the Court will make that finding. In that light, it seems to me that this Federal Youth Corrections Act is very similar to the Juvenile Act of the United States and as enunciated in *Kent* v. *United States.*

The major point I think of *Kent* is that you cannot assume reasons for waiver of a juvenile to the adult courts from a silent record. The reasons must be stated by the Court into the record so that there can be a meaningful hearing and a meaningful opportunity to respond and for meaningful review. It seem to be that that is the major holding of *Kent,* and that what applies equally to 5010(b).

I would object to an assuming that the Court made a finding, although I am sure that this Court did in its mind make such a finding; but the point is that the record is silent in that there is no statement as to why the Court rejected the Federal Youth Corrections Act and indeed whether the Federal Youth Corrections Act should be rejected.

Now, *Kent* has in its appendix certain factors which were used by the District of Columbia juvenile court to determine whether there should be a waiver of—and I'll just tick them off for the record. There are many things: seriousness of defense as a misdemeanor, violence and willfulness. There was no violence involved in this offense against persons or property. I am not sure how you define this particular charge, which is possession—the charge is possession of LSD, a misdemeanor and I guess if it's against anybody in the context of the charge, it's against himself. The merit of complaint, I assume

it has good merit. Associates—on whether they're youths or adults—in this case it was another youth. Maturity of the Defendant—I think he somehow demonstrates a lack of maturity. He doesn't act out as a 30 year old man might act out. He acts out more as a person of his age, a very young man. And, therefore, there should be certain degrees of mercy attended to it.

The record of the Defendant, he has none.

And the protection of the public and the prospects of rehabilitation. I think by the time this case came to court even today the public has been protected. He has done what he ought to with respect to cooperation, and he appears very likely to be rehabilitated.

So I think that the Federal Youth Corrections Act is an extension of the Youth Offender Act—or strike that —of the Juvenile Act and, therefore, all of the attendant procedural due process ought to be applied.

Since the record doesn't disclose this, I think that we ought to have an opening of his plea so that he can be afforded full procedural due process.

MR. STADTMUELLER: Your Honor, I only have a couple comments, and they relate to the withdrawal of the plea on the basis of the promises that apparently Mr. Dorszynski felt were made to him. I think the testimony that was elicited here this morning falls far short of what was set forth in the motion, namely that Mr. Dorszynski was told by Mr. Raebel of the Bureau of Narcotics he would receive probation under the Federal Youth Corrections Act. And I would share in Mr. Friebert's view that there is no question but when any defendant comes before this Court or any other, there is always the greatest expectation that this sentence will be light and that probation if the Court deems in its discretion to grant such probation.

In this case, if we look at some of the attending facts surrounding Mr. Dorszynski's dealings on the question of his receiving probation, he acknowledged very candidly here this morning he himself had no idea what the Federal Youth Corrections Act was all about until apparently Mr. Friebert called it to his attention.

I think when things of this type are considered, along with his not following up on the alleged comment by Mr. Raebel that he would contact the Judge with respect to probation under the Federal Youth Corrections Act, it tends to corroborate the fact that this Defendant had no more expectation of receiving probation or a light sentence than did any other Defendant. And I don't think the evidence here in any way can transcend or transcends the expectation of probation into a promise as is alleged in the various motions.

Concerning the other motions, Your Honor, I am going to rest on what we have previously submitted to the Court, and I don't want to belabor the points further. Thank you.

COURT: Do you want to respond, Mr. Friebert?

MR. FRIEBERT: I think that point made by counsel that the Defendant did not know what the Federal Youth Corrections Act was all about until I told him about is underscores the problem with the plea.

COURT: Do I understand from your position, Mr. Friebert, that there are really only two motions that you want the Court to resolve? There are other motions, but I think—I assume they are academic at this stage. Renewed motion for bail and—

MR. FRIEBERT: Yes.

COURT: Am I right in my assumption that you want the Court to rule on the *McCarthy* violation and also the 2255 application because of the alleged promises and inducements?

MR. FRIEBERT: Yes, and also challenge the Court did not make a finding—

COURT: Yes, that's part of the *McCarthy*, isn't it?

MR. FRIEBERT: I'm not sure whether that's not a separate ground.

COURT: All right. I'll be glad to address myself to both of them. I'll take a recess and consider the matter. The Court will reconvene when I'm through with the recess.

MR. FRIEBERT: Excuse me. There was another motion for reduction of sentence. I think they all intertwine.

COURT: Thank you.

(Whereupon a brief recess was taken.)

(Proceedings resumed at 11:20 o'clock, a.m.)

COURT: All right, the first matter I'll address myself to is the motion for reduction of sentence. That motion is denied.

Next, the Court will touch on the matter of failure of the Court affirmatively to make a finding that the Defendant, Mr. Dorszynski, did not qualify for the Youth Corrections Act. I believe that the—it is not mandatory that the Court speak to that issue. I am aware of the contrary stance taken in the District of Columbia Circuit. There is no such ruling by the Court of Appeals for the Seventh Circuit or for that matter any other circuit, and under those circumstances it's my belief that this Court should not treat the reference to the Youth Corrections Act as a mandatory requirement.

In the case of *Cox against America*—the *United States of America*, which is now on appeal in the Fourth Circuit as Case 71-1384, of which counsel are both aware—both counsel are aware—the Government's brief was submitted to the Court by the U. S. Attorney's Office in the instant Dorszynski case and I understand that's been given to Mr. Friebert also. Is that correct?

MR. FRIEBERT: Yes.

COURT: On page 26 of that brief, there is a citation from the Congressional Record in connection with the statute, and quoting Senator Kilgore as follows:

> "The judges say that the bill will give them an additional facility although use of the system provided by the bill will not be mandatory."

The Senator went on to say:

> "However. . . ."

This is all on page 26 of that brief:

> "However, when there is a case about which a judge is in doubt, if the accused is under the age of 22, the judge may refer the case to the Youth Correction Division."

Now, I appreciate that the Defendant's argument is that statutory language contemplates that the Court will affirmatively assert the application or absence of application of the Youth Corrections Act. And I recognize that that's been the ruling of the—in the District of Columbia Circuit.

However, I do not interpret the statute as mandatory for the reasons reflected in the *Cox* brief just referred to and further from the absence of any mandatory ruling by the Court of Appeals for this circuit. I decline to grant the Defendant's motion based on that contention.

Further, it seems to me that the Court impliedly holds the Youth Corrections Act not applicable and it does, as it did in the instant case, apply the standard sentencing authorizations. In committing Mr. Dorszynski for a one-year period, using a split sentence technique, I think the Court impliedly held that the Youth Corrections Act was not applicable.

The Defendant also urges that he should be permitted to withdraw his plea because under Rule 11 of *McCarthy* v. *United States*, 394 U.S., he was not advised that this entry of his plea would constitute a waiver of his compulsory self-incrimination. I find no merit to that argument. I find nothing in the decision of *McCarthy* v. *United States* which would justify the interpretation that Defendant's counsel has advanced.

I recognize that at page 466 there is a reference to the waiver against—to the privilege of self-incrimination —against self-incrimination, but I believe that the—there is a difference between that reference and the mandatory requirement that the judge mentions, the—that a plea of guilty constitutes a waiver of the privilege of self-incrimination.

Further, I invite attention to the question I put to Mr. Dorszynski appearing at page 4 of the transcript proceedings on February 14, 1972, where I said to him:

> "Q Now, you have a right to a trial, trial before a jury, a right to have your witnesses against you appear so you may be confronted by them. You are presumed innocent until and unless the Government is able to prove beyond a reasonable doubt

that you are guilty. If you enter a plea of guilty, you waive all that."

In my—that's the end of the quotation, and Mr.—that's the end of the question, and the answer was: "Yes, sir." In my judgment that constitutes an adequate compliance, indeed full compliance, with both Rule 11 and *McCarthy* v. *United States* and the directions that I have been able to ascertain from the Court of Appeals for this circuit.

The next question that the Court must consider is the Defendant's motion to be released from custody under a 2255 application, wherein he urges that his plea was induced by promises and coercion from Officer Raebel. I deny that application and that motion.

The testimony that's been adduced here this morning persuades me without the slightest hesitation to the conclusion that Mr. Dorszynski's contention as to promises and inducements and coercion is totally false. This is a man who's had his—is in his second year of college and must be deemed to understand the import of ordinary language. In the proceedings, the Court addressed two questions to him appearing on page 5 of the transcript, and I'll read them to you:

"Q Do you think arrangements have been made to the Court as to what your penalty would be?
A No.
Q So, subject to the maximum limitation, you understand you might get anything less than or as high as that but nothing more; is that correct?
A Yes, sir."

In my judgment, Mr. Dorszynski either misrepresented to the Court on those occasions or misrepresents here now his contention as to coercion.

On three specific points I am persuaded that Mr. Dorszynski lied in open Court this morning under oath. I think he testified falsely when he stated that he was told by Mr. Raebel that this being the first possession case, he could—that in a first possession case one usually gets

probation. I'm persuaded that Mr. Raebel did not say that or anything like it.

I'm also satisfied that Mr. Dorszynski testified falsely this morning when he stated that Mr. Raebel advised him that he didn't have to worry about jail.

And finally, I think Mr. Raebel testified falsely when he said—when he quoted Mr. Raebel as having stated that he, Mr. Raebel, would personally ask the Judge about his qualifications for the Youth Corrections.

(Discussion off the record.)

COURT: Mr. Dorszynski testified falsely saying that Mr. Raebel would personally bring to the Court or to the Judge's attention the matter of the Youth Corrections Act in relationship to Mr. Dorszynski.

Thus, I conclude that Mr. Dorszynski is not entitled to the relief he seeks, and I deny all his motions. I will ask the U. S. Attorney to submit an order for my attention—for my signature in that regard.

Now, the conclusion that Mr. Dorszynski has testified falsely provokes my concern for his right to remain on probation. I fully recognize that Mr. Dorszynski has the right to bring these proceedings in which he seeks to have his plea withdrawn, and under the law no more serious or harsh penalty can be imposed upon him because he seeks to do that and fails. Whether he succeeds or fails it would be immaterial. The fact is that a man should be free to do what Mr. Dorszynski has done.

North Carolina against Pearce is a good example of a man's—a defendant's protection in that regard. That is at 395 U.S. 711 at 723, but that does not apply in the instant case where the question is not one of a heavier sentence, but one of revocation of probation; and I believe and am thoroughly convinced that Mr. Dorszynski lied and lied outrageously to the Court under oath this morning. And I, therefore, believe that he should now be directed to show cause why his probation should not be terminated.

Mr. Friebert, do you want to address yourself to that matter?

MR. FRIEBERT: Yes, I am, frankly—I have to use the word outraged at the Court precluding a fact—unsuccessful 2255 application to threat—and now, the outright threat of snapping probation because of an unsuccessful attempt at it. I think *North Carolina* v. *Pearce* prohibits this.

If the Court says that Mr. Dorszynski was lying on the points, then he's desirous of a trial on it, but to snap probation because—the effect—the public policy effect of such a move I think would never to come into this court while he's on probation and challenge a plea because anybody who takes the stand runs the risk of such a ruling. That is too heavy a risk to impose on even the most meritorious of cases, because no one can predict how the trier of fact is going to view the testimony.

I could not in any conscience advise any client of mine on probation in this court to make any challenges during the period of probation. I think that such a move is—I—is outrageous. I don't see how this Court can say that this is not a penalty for bringing a 2255 petition.

His only recourse would be to make the assertion which he says happened but never take the stand, at the risk of blowing his probation.

What makes Mr. Raebel so honest? None of us were there. None of us were present at all at any of these proceedings. I'd like to advise the Court right now even that I was told by members of the United States Attorney's office that if we wanted—if we're successful, we could get a felony charge. I was told subsequent to that that they were kidding. The point where semantics and everything crosses from kidding to not kidding, from truth to fantasy, is a very strange line. People hear things the way they want to hear things. I heard that statement from members of the U. S. Attorney's office as a possible threat but proceeded anyways because I really didn't believe it myself that the United States Attorney would do that, as well as I thought that it would be illegal to do it, and that would be an interesting issue. But I told my client about that and warned him of that prospect.

I don't see how—first of all, I don't see how the Court can conclude that this man has perjured himself here. We have a burden of proof which obviously we did not sustain, but to cross the line of perjury is to, I think—I think to close our eyes to what happens in the world. Mr. Raebel is just as untruthful when he comes in here and says: "I have nothing to do with nothing." If the Court wants to believe that, I guess the Court has every right and power to believe that Mr. Raebel didn't do anything, that all of a sudden lo and behold here was this man coming in, dozen trips, for no reason. And no conversation, come in, how are you today, make the phone call, goodby. That to me belies the credibility of what happened in this Court, and I am really outraged because I don't think any lawyer in this district would be able to tell their client to come in and make any challenge, yes, sir, to plead, on a threat that if you lose and if the Court doesn't believe you, your probation goes. I think that violates all of due process.

If the government wants to bring a perjury charge, bring it; and we'll have a jury tell us whether Mr. Dorszynski committed perjury. That's a risk everybody takes, where the burdens of proof are beyond a reasonable doubt to a jury.

I am not prepared to proceed on such a matter, and I ask the Court fervently to reconsider its position and ask the Court how it, if it were a practicing lawyer before the bar of this Court, could in any good conscience, were the Court a practicing lawyer, advise any Defendant on probation to this court to challenge his plea. And it's obvious that any challenge of a plea is nothing but a swearing contest. I think that's the reason for *McCarthy*. I knew before today what Mr. Raebel would say. I've been through too many of these, and the Court has been through too many of these and has read transcripts. It always is that. One man says one thing and one man says another, and the Court always finds that the Defendant is lying and the man with the Government is telling the truth. That is always the conclusion in a one-on-one swearing contest, and then to compound that and say that he's to have his probation taken away

from him is to take this entire problem and say: "We'll never see it again because it will never be brought to court again." And that's my comments on the Court's position.

COURT: Do you want to be heard?

MR. STADTMUELLER: No, Your Honor, I have nothing to add.

COURT: I find no merit to Mr. Friebert's contention. It seems to me that this Court is not increasing Mr. Dorszynski's penalty. In the first sense, on the contrary, it's entirely within the punishment that was originally afforded Mr. Dorszynski. I will not debate with Mr. Friebert the correctness of my decision that Mr. Dorszynski has lied under oath this morning. The Court has reached its conclusion in that regard, and I must say with great concern and attention to the correctness or incorrectness of the testimony that I heard this morning. I am persuaded that Mr. Dorszynski, having committed those acts in my presence, should not be entitled to the benefits of probation; and, therefore, at the conclusion of this hearing on that subject, I now direct and enter an order vacating—terminating the probation of Douglas Dorszynski and commit him to the custody of the Marshal.

MR. FRIEBERT: Your Honor, before the Court finalizes that, may we have notice and time to prepare for such a hearing instead of a sua sponte order of the Court.

I would like to research and investigate whether the Court on its own statement as to what it concludes that facts to be can then determine that those are the facts and in effect be prosecutor and judge in the situation. I would like to research the fact as to my statements earlier as to whether this can be a proper basis of a revocation of probation. I would like to—there are many things that I would like to research. I would ask that certainly. I think the Federal Rules compel notice and an appropriate hearing. I haven't had any notice except five minutes ago. I don't think that's adequate time for me to prepare to represent Mr. Dorszynski in this.

COURT: I believe that since the matters that are referred to all occurred in open Court in the Court's presence, and since Mr. Dorszynski through his counsel

did have an ample opportunity to respond to the statement that the Court was contemplating revocation, I see no propriety in a—in any other formal proceedings. The application for further delay or hearing is denied.

MR. FRIEBERT: May we have a stay pending appeal?

COURT: Denied.

MR. FRIEBERT: May we have a reason?

COURT: A reason for what?

MR. FRIEBERT: For denial of a stay pending appeal.

COURT: Well, I think the—yes, I'd be happy to tell me—be pleased to tell you my reasoning. It is simply that I consider the conduct of the Defendant to justify forthwith termination of his probation. I think that's a discretionary matter with the Court. If it were—if it were something that the Probation Department resolved or considered in the absence of the Court, it would be something to which you would be entitled to notice and an opportunity to make a submission to the Court. But this is a matter that has occurred in the Court's presence and is the result of a—of a hearing in open Court, and I think any stays or delays are—are just simply unwarranted.

MR. FRIEBERT: Yes. One other point. May we have a stay on the imposition of sentence on the grounds that *United States* v. *Waters* and *United States* v. *Howard*, which are two Court of Appeals decisions out of the District of Columbia, and involving a question of first impression in this District, as to whether this Circuit and District—as to whether a sentencing proceeding can proceed on a youth without a—first making findings with respect to commitment and treatment under the Federal Youth Corrections Act are meritorious and entitled to an appeal and, therefore, entitled to a stay pending that disposition.

COURT: Denied. That application is denied.

MR. FRIEBERT: Is the matter meritorious, because I think Mr. Dorszynski will not be able to afford counsel for an appeal.

COURT: Well, I suggest that you assist him to the extent of having him apply to the Court of Appeals for appointment of counsel if you choose to take further proceedings, but that's something I cannot function on. I don't appoint counsel on appeal.

MR. FRIEBERT: I believe we would probably need a certificate of probable cause.

COURT: You can submit such a certificate, and I'd be inclined to grant—to sign it, but that wouldn't affect the matter of stay. I think the termination of probation is a purely discretionary matter with the Judge, with the Court, and there should be no delays in the imposition of that termination of probation where it's based on circumstances in open Court impropriety.

So far as the legal matter of affirmative recitation of the Youth Corrections Act, I recognize that there is an issue presented under the District of Columbia cases, and from that standpoint I certainly would honor, respect the Defendant's desire to appeal.

MR. FRIEBERT: Yes, but under Rule 38 in such a situation and the Bail Reform Act I think we would be entitled to bail pending an appeal because that appeal on that aspect attacks the underlying conviction. There is no reason to keep him in jail pending the appeal on the underlying conviction despite the revocation of probation, which is a separate issue.

COURT: Well, you know I have previously denied your application for bail pending the determination of these motions. You have then, as I understand it, sought that relief on an emergency basis from the Court of Appeals and it was denied to you. I think the same circumstances prevail. Do you have anything else, Mr. Friebert?

MR. FRIEBERT: Yes. Since the Defendant is probably indigent, I would ask the Court to advise the Defendant of his right to counsel and right to appeal.

COURT: We now stand adjourned.

CONDITIONS OF PROBATION

(Formal parts omitted)

In accordance with authority conferred by the United States Probation Law, you have been placed on probation this date, February 14, 1972, for a period of two (2) years by the Hon. Myron L. Gordon, United States District Judge, sitting in and for this District Court at Milwaukee.

It is the order of the Court that you shall comply with the following conditions of probation:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) You shall associate only with law-abiding persons and maintain reasonable hours.

(3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.

(4) You shall not leave the judicial district without permission of the probation officer.

(5) You shall notify your probation officer immediately of any change in your place of residence.

(6) You shall follow the probation officer's instructions and advice.

(7) You shall report to the probation officer as directed.

The special conditions ordered by the Court are as follows:

Defendant released from physical confinement May 11, 1972, probation commences. Probation terminates May 11, 1974.

I understand that the Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by

law, may issue a warrant and revoke probation for a violation occurring during the probation period.

I have read or had read to me the above conditions or probation. I fully understand them and I will abide by them.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT DATED JULY 20, 1973

(Formal Parts Omitted)

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and SPRECHER, *Circuit Judge*.

SWYGERT, *Chief Judge*. Petitioner-appellant, Douglas Raymond Dorszynski, appeals from orders of the district court revoking his probation and denying his motions for release from custody pursuant to 28 U.S.C. § 2255, to withdraw his plea of guilty, or alternatively for reduction of sentence.

The petitioner pleaded guilty on February 14, 1972 to unlawful possession of 1000 tablets of lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 2. He was sentenced to the custody of the Attorney General for a period of one year, 90 days of which were to be served in a jail-type institution. The execution of the remainder of the commitment was stayed and the petitioner was placed on probation for a period of two years following his jail sentence.

While serving his sentence, the petitioner filed a series of motions: (1) for release from custody pursuant to 28 U.S.C. § 2255, asserting that FED. R. CRIM. P. 11 was not observed because the petitioner was not advised that he was waiving his privilege against self-incrimination, that he was also not advised that he was subjecting himself to incarceration for a period of six years by entering a plea of guilty pursuant to the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026, and that the court made no finding that the defendant would not derive benefit from treatment pursuant to 18 U.S.C. § 5010(b) or (c); (2) to withdraw his plea of guilty pursuant to FED. R. CRIM. P. 32(d), asserting that his plea was coerced and was the product of promises and inducements made to him by Acting Special Agent William W. Raebel of the Dangerous Drugs and Narcotics Division to the effect that if he cooperated with the federal authorities and entered a plea of guilty, he would receive a sentence of probation pursuant to the provisions of the Federal

Youth Corrections Act; and (3) to reduce his sentence pursuant to FED. R. CRIM. P. 35. At the time of the hearing on the motions the petitioner had finished his jail sentence and was on probation.

Both Agent Raebel and the petitioner were witnesses at the hearing on the motions. The petitioner testified that Raebel had told him that he, Raebel, would ask the judge for probation of the petitioner under the Federal Youth Corrections Act.[1] Raebel denied this. The petitioner further testified that his testimony about Raebel's promise was not inconsistent with his sworn answers in response to the trial judge's questions at the time of the plea of guilty. At that time, he had answered that there were no promises, threats, or pressures to make him plead guilty and that he did not think arrangements had been made with the court as to what the penalty would be.

The trial judge indicated that he believed that the petitioner had testified falsely. He denied the motions and then requested counsel to show cause why the probation should not be terminated for lying under oath. After defense counsel argued against this action, the judge terminated the petitioner's probation and committed him to custody. This court ordered the release of the petitioner on bail pending appeal.

I

The petitioner's first contention is that the trial judge did not observe Rule 11 of the Federal Rules of Criminal Procedure by not expressly advising the petitioner that by entering a plea of guilty he was waiving his fifth amendment right not to be compelled to testify against himself. According to the petitioner, *McCarthy* v. *United States*, 394 U.S. 459 (1969), and *Boykin* v. *Alabama*, 395 U.S. 238 (1969), require that a defendant be advised that, by pleading guilty, he is waiving his right against self-incrimination.

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[1] If the petitioner had been placed on probation under the Federal Youth Corrections Act, he would have been eligible to have the record of his conviction expunged pursuant to 18 U.S.C. § 5021(b).

In the case before us the trial judge advised the petitioner that by pleading guilty he was waiving his rights to trial by jury and to confront the witnesses against him. The judge further advised the petitioner that he was presumed to be innocent and that the Government had the burden to prove that he was guilty beyond a reasonable doubt. The petitioner stated that he desired to waive those rights and the presumption. The judge also asked the petitioner if he had ample time to talk to his attorney and to understand what was happening. The petitioner said yes. The petitioner, a second year college student at the time of the plea and represented by counsel, has never alleged that he did not understand he was waiving his right against self-incrimination.

Neither *McCarthy* nor Rule 11 require a ritualistic question to a defendant asking if he understands that he is waiving his right against self-incrimination. The waiver is implicit. *United States* v. *Webb*, 433 F.2d 400, 403 (1st Cir. 1970).

II

The petitioner's second contention is that it was improper to commit him, a nineteen year old, as an adult unless the trial judge had first determined on the record that the petitioner would not benefit from treatment under the Federal Youth Corrections Act.[2]

The petitioner admits that the Youth Corrections Act was never mentioned in sentencing and that all parties assumed the petitioner was sentenced as an adult under the Criminal Code. He argues, however, that section 5010(d) of the Act requires the district judge to make a specific finding with reasons as to why the petitioner would not derive benefit from treatment pursuant to sec-

[2] The petitioner has also made an argument in his brief that he admits was not raised in the district court: That he could only have been placed on probation under the Federal Youth Corrections Act; and since he was placed on probation, he must have been sentenced under the Federal Youth Corrections Act and not as an adult. This argument has no merit since petitioner was not placed on probation but received a "split" sentence in accordance with 18 U.S.C. § 3651.

tion 5010(b) or (c). The authority for this position is *United States* v. *Waters*, 437 F.2d 722, 725 (D.C. Cir. 1970), which held that such a finding had to be explicitly or implicitly made.

The legislative history of the Youth Corrections Act establishes that a purpose of the Act was to make available a system for the sentencing and treating of youths to be used in the judge's discretion. *See* 1950 U.S. Code Cong. Service, p. 3983. It was designed to provide an alternative to sentencing as an adult under the Criminal Code.

The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to section 5010(b) or (c). Insofar as *Waters* requires that the trial judge make an explicit finding to that effect, we decline to follow it.

III

Lastly, the petitioner contends that the revocation of his probation violated his rights to due process of law. At the conclusion of the post-conviction evidentiary hearing, the trial judge announced that Dorszynski testified falsely that agent Raebel had promised prior to sentencing to bring to the judge's attention the availability of the Youth Corrections Act. The judge followed up this announcement by saying, "And I, therefore, believe he [the petitioner] should show cause why his probation should not be terminated." At the conclusion of comments by petitioner's counsel, the court ordered the probation terminated.

The judge took the position that the petitioner had perjured himself in the presence of the court and that by terminating probation, he was not increasing petitioner's punishment but only reasserting the penalty originally imposed. The judge also inferred that under the circumstances no "formal proceedings" in conformity with FED. R. CRIM. P. 32(f) were required.

It is evident from the record that the judge determined that the petitioner was guilty of perjury, an offense punishable under 18 U.S.C. § 1621. Although the petitioner was not formally charged with that offense nor afforded a trial to determine his guilt, he was in a very practical sense convicted—in the mind of the judge—and punished by the revocation of his probation.

The only condition of the petitioner's probation prescribed at the time of sentence that is relevant was that he should "refrain from violation of any law [federal, state, and local]." Rule 32(f) provides that probation should be revoked only after a hearing "at which the defendant shall be present and apprised of the grounds on which such action is proposed." It is highly questionable whether the procedure by the rule was observed even in a rudimentary sense in the situation before us. But bypassing that and assuming that the petitioner did testify falsely, such conduct did not violate any of the specified conditions of his probation. Only upon being accused of and convicted of perjury in accordance with procedural due process would the petitioner have violated the condition of probation referred to above.

We appreciate the sense of outrage that the district judge apparently experienced upon becoming convinced that the petitioner had not testified truthfully. False swearing, however, not only is a serious offense, legally and morally, but also its proof must be established, if legal consequences are to result, by procedures that fully comport with due process. Although contempt was not alluded to in the instant proceedings, its analogy is readily apparent. *Ex parte Hudgings*, 249 U.S. 378 (1919), was a case where a witness was summarily punished for contempt after the trial judge had determined that the witness had testified falsely. In reversing the contempt decree, Chief Justice White wrote:

> It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the ob-

> structive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purposes of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled. 249 U.S. at 383-84.

Were probation terminable upon a judge's summary determination in a post-conviction proceeding that the probationer had testified falsely, the chilling effect of such a practice upon the pursuit of post-conviction remedies is quite apparent.

While we do not wish by our decision to give countenance to those who would take their sworn testimony in court lightly, for the reasons we have stated, we are constrained to reverse the order revoking the defendant's probation. The orders denying the other motions are affirmed.

Reversed in part; affirmed in part.

SUPREME COURT OF THE UNITED STATES

No. 73-5284

DOUGLAS DORSZYNSKI, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 10, 1973

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